NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KEITH ROBERT LUGO Petitioner, v. K.W. PRUNTY, WARDEN, Respondent.	) No. 96-56390) D.C. No. CV 97-1328-BTM) MEMORANDUM[1]*

Appeal from the Decision of the United States District Court
for the Southern District of California,
Barry Ted Moskowitz, District Judge

Argued and Submitted July 11, 1997
Pasadena, California

Before: CANBY and THOMAS, Circuit Judges, and KING[2]**, District Judge.

Defendant-Appellant Keith Robert Lugo ("Lugo"), appeals the denial of his habeas corpus petition, 28 U.S.C. § 2254, challenging, on grounds of ineffective assistance of counsel, his jury

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

conviction for two counts of first degree murder and his sentence of fifty-one years to life. The parties are familiar with the facts and we do not repeat them here. We have jurisdiction under 28 U.S.C. § 2253[1] and affirm.

We review de novo a district court's denial of habeas relief. Jeffries v. Blodgett, 5 F.3d 1180, 1187 (9th Cir. 1993) (citing Dickson v. Sullivan, 849 F.2d 403, 405 (9th Cir. 1988). Under 28 U.S.C. § 2254(e)(1), findings of fact by the state court are presumed to be correct and are reviewed for clear error. Id. To reverse a conviction on grounds that a defendant's Sixth Amendment right to effective assistance of counsel was violated, the defendant must show both: (1) that counsel's performance was deficient, i.e., "counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed the defendant by the Sixth Amendment"; and (2) that the deficient performance prejudiced the defense, i.e., "counsel's errors were so serious as to deprive the defendant of a fair trial whose result

---

[1] The Government contends that the Antiterrorism and Effective Death Penalty Act (the "Act"), bars this appeal. 28 U.S.C. § 2254(d). It does not. See Lindh v. Murphy, No. 96-6298, 1997 WL 338568, at *2 (U.S. June 23, 1997) (Act does not apply to noncapital cases pending when Act was passed); Jeffries v. Wood, 103 F.3d 827, 827 (9th Cir. 1996) (en banc) (Act does not apply to cases filed prior to the Act's effective date).

is reliable." Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2063 (1984).

Lugo alleges that the following constituted ineffective assistance of counsel: (1) failure to proceed to trial before joinder; (2) refusal to appoint counsel of choice; (3) failure to object to shackling in view of the jury; and (4) failure to object to plea negotiation statements. We reject all of Lugo's claims because we find that the evidence against Lugo is in fact so overwhelming that the prejudice prong of Strickland cannot be satisfied. "A court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." Strickland, 466 U.S. at 697, 104 S.Ct. at 2069. As the state appellate court concluded:

> The appellate record in this case demonstrates that Lugo was convicted not because of any act done or not done by counsel, but because of the overwhelming evidence of his guilt. Lugo admitted at trial (and frequently had bragged of) committing the killings. His defense was that while he held a 9-millimeter automatic handgun he was coerced by his fellow executioner, Michael Smith, into committing the killings although Smith held only a knife in his hand. It is hardly surprising the jury rejected this defense, and no act or omission of Lugo's counsel, on this record, would have likely resulted in a more favorable verdict for Lugo. Nothing in the materials submitted

with the habeas petition supports a contrary conclusion.

A careful review of the record forces us to agree.

Accordingly, the district court's denial of habeas relief is

AFFIRMED.